Supreme Court, U.S.
FILED
JUN 6 1997
OFFICE OF THE CLERK

No. 96-1783

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT,
Petitioner,
v.
OFFICE OF INDEPENDENT COUNSEL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF WILLIAM T. COLEMAN, JR., ARTHUR B. CULVAHOUSE, JR., LLOYD N. CUTLER, NICHOLAS deB. KATZENBACH, ABNER J. MIKVA, AND ELLIOT L. RICHARDSON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

WILLIAM T. COLEMAN, JR.*
555 13th Street, N.W.
Suite 500 West
Washington, D.C. 20004
(202) 383-5325

ARTHUR B. CULVAHOUSE, JR.
LLOYD N. CUTLER
NICHOLAS deB. KATZENBACH
ABNER J. MIKVA
ELLIOT L. RICHARDSON

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	2
ARGUMENT	3
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:	Page
Clinton v. Jones, 65 U.S.L.W. 4372 (U.S. May 27, 1997)	2, 6
Nixon v. United States, 418 U.S. 683 (1981)	4, 5
United States v. Bob, 106 F.2d 37 (2d Cir. 1939)	5
Statutes:	
2 U.S.C. § 288(f)	4
28 U.S.C. § 535(b)	4, 5
Pub. L. No. 95-521, 92 Stat. 1824 (1978)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1783

OFFICE OF THE PRESIDENT,
Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF WILLIAM T. COLEMAN, JR., ARTHUR B. CULVAHOUSE, JR., LLOYD N. CUTLER, NICHOLAS deB. KATZENBACH, ABNER J. MIKVA, AND ELLIOT L. RICHARDSON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amici are lawyers and members of the Bar of this Court who have formerly served as Attorney General, Secretary of another Cabinet Department, or Counsel to the President in both Republican and Democratic administrations.[1] In their former official capacities, *amici* frequently sought and received legal advice from other gov-

[1] No counsel for a party is an author of this brief in whole or in part. Other than *amici*, no person or entity made a monetary contribution to the preparation or submission of this brief.

ernment lawyers or, as government lawyers, gave such advice or created work product in anticipation of litigation or congressional investigations.

Amici are filing this brief to urge the granting of the petition because of their concern that the majority opinion below (1) forecloses the availability of the attorney-client privilege to communications between government lawyers and government officials concerning the conduct of government business, at least vis-à-vis a federal grand jury, and (2) forecloses the availability of the lawyer's work product doctrine to the work of government lawyers in anticipation of court litigation or congressional investigations. Written consents of all parties to the filing of this brief have been filed with the Clerk pursuant to Supreme Court Rule 37.2.

REASONS FOR GRANTING THE PETITION

Amici submit that the novel and sweeping ruling of the Court of Appeals flies in the face of *amici*'s previous and widely shared understanding—based on their experience as lawyers serving in the government as well as congressional statutes, case law and the published views of legal scholars—that these privileges apply to communications between government officials and government lawyers, whether on an absolute or qualified basis. *Amici* further submit that (1) unless this ruling is reversed or substantially modified by the Court, government officials will be uncertain as to the confidentiality of such communications, and will therefore be less willing to seek full and frank legal advice from government lawyers concerning official government business, and (2) the ability of government lawyers to give advice or to prepare for litigation or congressional investigations will be curtailed by the unavailability of the work product doctrine. Regardless of how this case is ultimately decided, the importance of these issues to the conduct of the public business justifies the grant of the petition. *See Clinton v. Jones*, 65 U.S.L.W. 4372, 4375 (U.S. May 27, 1997). It is also

important to the public business to develop clear and concise rules applicable to all federal circuits, since government lawyers must deal with these issues under severe time pressures that require them to make quick decisions about the confidentiality of their communications.

ARGUMENT

Executive Branch officials, from the President to his appointed aides and the Civil Service, have to make numerous decisions related to the conduct of their office that require legal advice from government lawyers. Examples are advice as to their constitutional or legislative duty or authority to act, the steps necessary to comply with conflict of interest or ethics laws in particular factual contexts, their response to judicial or legislative subpoenas for documents and testimony, and the drafting and approval of grants and contracts. Failure to obtain and to follow such advice can result in personal civil or criminal liability or in official misconduct or errors of judgment that could cost them their jobs and lower public confidence in the national government of the day.

It is obviously in the public interest to encourage governmental officials to seek legal advice concerning their conduct of the government's business, just as we encourage private citizens and private business organizations to seek such advice. That is why, from time immemorial, the attorney-client privilege has existed.

It is equally in the public interest to encourage government lawyers to create work product in anticipation of litigation or congressional investigations, just as we encourage lawyers for private citizens and businesses to create work product.[2] That is why the lawyer's work product doctrine exists.

---

[2] To prepare for such matters, government lawyers need to interview and to prepare government witnesses, to insure proper responses to document requests and subpoenas, and to record their impressions as to the credibility of witnesses, trial and investigation

Until the decision below, *amici* had believed that the attorney-client privilege and the work product doctrine were available to government officials and government lawyers with respect to their conduct of official business, and that any qualification of these privileges with respect to grand jury or criminal trial subpoenas would at least be subject to the protective procedures set forth with respect to claims of Executive privilege in *Nixon v. United States*, 418 U.S. 683 (1981), such as a showing of particularized need and *ex parte* review of the subpoenaed information by a federal judge for relevance and admissibility into evidence. In addition to the authorities cited by petitioner as the basis for this belief, *amici* call attention to Public Law No. 95-521, 2 U.S.C. § 288(f), creating the Office of Counsel to the Senate, which specifically provides that the attorney-client privilege applies to consultations between Senators and Counsel to the Senate.[3] But under the decision below and the argument made by the Independent Counsel, even these qualified protections would not be available.

The Court of Appeals relied on 28 U.S.C. § 535(b) as a "significant" reason for its denial of any government attorney-client privilege in the face of a grand jury subpoena. That statute requires any "information" received in an executive branch agency relating to criminal viola-

---

tactics, and their analyses of the factual and legal strengths and weaknesses of the administration's position. On the Independent Counsel's theory, he could even enforce a series of grand jury subpoenas for all work product prepared or to be prepared by White House lawyers in the course of responding to previous grand jury subpoenas or similar demands from congressional investigating committees.

[3] Title 2 U.S.C. § 288(f) reads as follows: "The Counsel and other employees of the Office shall maintain the attorney-client relationship with respect to all communications between them and any Member, officer or employee of the Senate." Another title of this same law created the office of the Special Prosecutor (now the Independent Counsel). Pub. L. No. 95-521, Title VI, 92 Stat. 1824, 1867-74 (1978).

tions by government officers and employees "to be expeditiously reported to the Attorney General by the head of the department or agency." Even if the Court of Appeals correctly characterized this statute as requiring executive branch employees to "report criminal wrongdoing by other employees to the Attorney General" (see Pet. App. 17a), it would not follow that no attorney-client privilege exists for *any and all* communications between a government official and a government lawyer. If the lawyer properly concludes that the communication contains no evidence of "criminal wrongdoing", he or she has no statutory duty to report the attorney-client communication to the Attorney General.[4] If the Independent Counsel issues a grand jury subpoena for every detail of the communication, at least the protective procedures specified in *Nixon* should apply.

In *amici*'s submission, this Court should also review the holding below that no attorney-client privilege for communications between government officials[5] and government counsel exists even when the government official's private counsel is also present and a "common defense" understanding exists between government counsel and private counsel (see Pet. App. 21a-23a). According to the Court of Appeals, the Office of the President and the First Lady lack sufficient common interest for the common defense rule to be applicable: "The OIC's investigation can have no legal, factual, or even strategic effect on the White House as an institution" (*Id.* at 22a). But that is open to serious question when, as here, Independent

---

[4] Even under the attorney-client privilege between a private person and his private lawyer, "communications from a client to an attorney about a crime or fraud to be committed are not privileged." *United States v. Bob*, 106 F.2d 37, 40 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939). But this does not mean that no attorney-client privilege exists as to other communications between the lawyer and the client.

[5] *Amici* take no position on the question of whether the First Lady is a government official for this purpose.

Counsel (and congressional) subpoenas are addressed to "The White House", and the Office of White House Counsel has the professional responsibility of accurately responding—a responsibility enforceable by criminal and civil sanctions. In the experience of *amici*, many similar situations arise in which government counsel and private counsel for a government official have a sufficiently common interest, personal as well as institutional, to support a common defense arrangement. When such an arrangement exists, each party must consent to any waiver, and that clearly has not occurred in this case.

Amici recognize that in a case like the present one, questions may arise as to which government office or officer has the authority to invoke or to waive the attorney-client privilege or the lawyer's work product doctrine. In a private corporation, the privileges belong to the corporation itself, and the decision to invoke or to waive is for the board of directors or, by delegation, for the chief executive officer to make. The Executive Branch is an entity analogous to the corporation, but with one fundamental distinction: under Article II all of its authority is vested in a single person—the President. "[A] President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it." *Clinton v. Jones*, 65 U.S.L.W. at 4382 (Breyer, J., concurring). The President is therefore the officer and the Presidency is the office to decide whether to invoke or to waive an Executive Branch privilege against a grand jury subpoena issued to "The White House" or any other entity within the Executive Branch.

In the present case, however, as *amici* understand the ruling below and the position of the Independent Counsel, the issue is not who has the authority to invoke or to waive the attorney-client privilege and the work product doctrine; the question is whether the privilege and the doctrine apply at all to government lawyers and officials in the face of a grand jury subpoena. That question is

surely one for the Judicial Branch to resolve in a proper case or controversy, and this proceeding to compel compliance with a subpoena addressed to "The White House" appears to *amici* to be the appropriate way to resolve it.

The Independent Counsel asserts that in this grand jury investigation and any resulting criminal proceeding, he acts for the "United States" (*i.e.*, the Executive Branch as the enforcer of the criminal laws), but that alone would hardly empower him finally to resolve the issues of whether and how his grand jury subpoena addressed to "The White House" should be enforced. The primary interest of an Independent Counsel is in investigating the single case or set of related criminal cases assigned to him; he is in no position to balance this interest against the need of the unitary Executive Branch for confidential communications between its officers and Executive Branch lawyers. The last word on this issue is not for the Independent Counsel, but for this Court.

CONCLUSION

For the reasons set forth above, *amici* respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.*
555 13th Street, N.W.
Suite 500 West
Washington, D.C. 20004
(202) 383-5325

ARTHUR B. CULVAHOUSE, JR.
LLOYD N. CUTLER
NICHOLAS DEB. KATZENBACH
ABNER J. MIKVA
ELLIOT L. RICHARDSON

June 1997

* *Counsel of Record*